

January 1998 Declaration unequivocally informed the Commission that the License Renewal Application "Yes" certification related to the PIF question was incorrect.<sup>6</sup>

28. The Bureau contends that Mr. Ramirez could not have believed that the City Visions issues/programs list could have satisfied the Commission's requirements. (EB Findings ¶ 101.) The Bureau, substituting its own law-school educated viewpoint, finds it incredible that Mr. Ramirez could have overlooked the rule requirements related to quarterly placement of the lists in the file. Years later, when the vast majority of the alleged defects raised by GGPR have been disposed of by the Commission as irrelevant, untrue or unsubstantiated, it may be easy for experienced counsel at the Bureau to hone in on this remaining mixed legal/factual question out of many in the License Renewal Application and find it hard to believe that a non-lawyer did not focus on the fine print of the FCC regulation. But Mr. Ramirez is not a lawyer, was inexperienced in FCC renewal applications and was juggling not only many critical duties and changes at the Station but also had to respond to many questions on the License Renewal Application.

29. Finally, the Bureau argues that Mr. Ramirez's January 1998 Declaration misrepresented to the Commission that he had properly maintained the PIF according to Commission rules throughout his tenure, beginning in August 1996. (EB Findings ¶¶ 99-100.) In support of this argument, the Bureau cites a sentence from Mr. Ramirez's January 1998 Declaration in which he states that he followed up on his conversation with Mr. Evans with a later review of the PIF. (EB Findings ¶ 41.) The Bureau has taken the referenced sentence

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<sup>6</sup> SFUSD agrees, however, that SFUSD had an obligation to make it perfectly clear to the Commission, by filing an amendment to the License Renewal Application, to change the PIF certification to "No" and that was not done in connection with the investigation into or response to the allegations of the Petition to Deny. Mr. Ramirez in his October 1997 Memo expressed to counsel that the PIF certification error should be corrected with an explanation; he reasonably expected that counsel would have taken the appropriate steps to do so.

from Mr. Ramirez's declaration out of context. The purpose of this statement was to respond to the affidavit filed by Mr. Evans (EB Exh. 5 at 13): the relevant paragraph of Mr. Ramirez's 1998 declaration begins: "With respect to Exhibit C (Affidavit of David) Evans . . . ." (SFUSD Exh. 4 at 49.) The Petition to Deny had claimed that after Mr. Evans told Mr. Ramirez that the PIF was incomplete, "[n]o effort was made by Ramirez to correct this failure."

30. Mr. Ramirez's statement that he "nevertheless attempted to follow up on this conversation by seeking to determine what was in the files already and what needed to be added to make them complete and in conformity with the Commission's requirements," was made to refute that claim; not, as the Bureau suggests, to indicate that he did so immediately. Moreover, not only is this quote cited out of the context of the January 1998 Declaration, but it is taken out of the context of the record as a whole. Mr. Ramirez volunteered in his direct testimony that the sentence, if taken out of context, "could give the impression that I immediately followed up on Dave [Evan]'s comments by investigating and revising the PIF. If so, I wish to clarify that I did not review the PIF until months later." (SFUSD Exh. T1 at 11.)

31. Ultimately, the Bureau seeks to reveal Mr. Ramirez's alleged web of deception by suggesting that he lied at his deposition in November 2004. Indeed, the Bureau asserts that Mr. Ramirez testified at deposition that he never realized that he made a mistake until after he left KALW, and that he never shared his realization that he had made a mistake with anyone. In supporting this claim, the Bureau cites to SFUSD Exh. 1 at 56-58, 86-87. Closer examination of the deposition transcript, however, reveals that the Bureau does not accurately portray the record. At deposition, Mr. Shook asked Mr. Ramirez whether he realized that he made a mistake "as a result of the arguments made by Petitioners," or whether he "[came] to the realization after [he] started working at CPB." Mr. Ramirez responded, "Yes. There was

definitely a moment of oops, if I had known better I could have done better. Yes, there was a moment of oops. I don't remember if it came out of my reading of this or if it came out of Ernie Sanchez explaining to me what was going on." Mr. Ramirez most assuredly did not state that he only realized the mistake after leaving SFUSD. Mr. Shook then repeatedly questioned Mr. Ramirez about conversations he may or may not have had with then-counsel Attorney Sanchez. After objection by SFUSD's counsel and instruction to Mr. Ramirez not to disclose attorney-client communications, Mr. Shook clarified that "I don't think that was the nature of this question." In other words, Mr. Shook explicitly limited his question to whether Mr. Ramirez told anyone other than Attorney Sanchez that he may have made a mistake on the Renewal Application. Still confused, Mr. Ramirez stated that "I don't know if I'm supposed to answer" presumably because he still had in his mind conversations with Attorney Sanchez.

32. To imply that Mr. Ramirez did not disclose his mistake to Attorney Sanchez is simply inaccurate. Notwithstanding the mischaracterization of the deposition testimony above, the record evidence is plain that Mr. Ramirez communicated his discovery in the October 1997 Memo. In fact, the Bureau acknowledges that Attorney Sanchez read the memo on October 6, 1997, and then spent over two hours discussing the issues addressed therein with Mr. Ramirez on October 8, 1997. (*See also*, EB Exh. 7 at 3.) Finally, Mr. Ramirez plainly stated that he had made a mistake in his 1998 January Declaration.

**2. Mr. Helgeson's 1998 Declaration Served The Limited Purpose of Discussing GGPR's Unethical Conduct, and Did Not Contain Any Misrepresentations or Lack of Candor**

33. The clear purpose of William Helgeson's January 1998 Declaration (the "Helgeson 1998 Declaration") was to identify the source of GGPR's exhibits to the Petition to Deny, which included confidential documents that were taken from KALW files without

proper authorization by Mr. Helgeson or Mr. Ramirez. As evidenced by the content of the eight-paragraph Helgeson 1998 Declaration, GGPR's unauthorized possession of various Station documents was its focus and purpose. The Bureau has extracted two sentences from this two-paged declaration, and attempts to weave a new declaration from these sentences, ignoring the content of the bulk of the declaration.

34. Mr. Helgeson's 1998 Declaration begins by identifying his position and responsibilities, and identifies the location of the file cabinet that contained Station files. The Declaration states that Mr. Helgeson has "responsibility for maintaining a four-drawer file cabinet" in his work area, and clarifies that the cabinet is located near his desk at the Station. (SFUSD Exh. 4 at 74.) The Declaration continues by stating that "The third drawer of that file cabinet contains KALW's public file. The other three drawers contain non-public business-related documents that are the property of KALW and SFUSD. Only I and my supervisors have authorized access to these other three drawers." (SFUSD Exh. 4 at 74.)

35. This section of Helgeson 1998 Declaration clearly makes a distinction between the public and private files in the file cabinet, and makes it clear that only authorized staff were permitted access to the three non-public drawers. Later in the Declaration, Mr. Helgeson describes in more detail the documents that were taken from the "above-described cabinet in one of the non-public drawers." (SFUSD Exh. 4 at 75.) Therefore, Mr. Helgeson's mention of the PIF was in the context of verifying that documents used by GGPR were taken from the three private drawers of the file cabinet that were not supposed to be accessed by others, in contrast to the one drawer that contained information that could be accessed by the public.

36. Mr. Helgeson's 1998 Declaration also includes a statement that Mr. Helgeson was "aware of, and have assisted with, an ongoing affirmative effort since the arrival of Jeffrey

Ramirez as General Manager of KALW, to update and maintain the station's public inspection file in accordance with the rules of the Federal Communications Commission." (SFUSD Exh. 4 at 74.) This statement refers to Mr. Helgeson's supporting role to complete specific tasks assigned to him by Mr. Ramirez in the course of completing the License Renewal Application or responding to the Petition to Deny.

37. Mr. Helgeson has consistently testified that he in no way interpreted that language to mean that he was responsible for ensuring compliance with FCC rules and regulations related to the PIF; nor that he and Mr. Ramirez began work on the PIF beginning in Mr. Ramirez's first days at the Station. (Tr. 806, 825) (Judge Sippel: You didn't have a clue [about the FCC rules?] A: I never--no, I did not have a clue. I only knew from what my supervisors told me, and I assisted him.) (Tr. 1165) ("I didn't in anyway want to imply that it was, say, on day one he walked in the office and started. But since--since he had arrived he had--he had worked on it. And I was aware that he had worked on it in the time since he had arrived. And so that's what--that--that was the implication of that statement."); (Tr. 819) ("I agreed with that statement in my declaration because I assumed that that's what Jeff was doing. I didn't have an independent knowledge of the public--of the FCC rules. So I just assumed that Jeff was doing it in accordance with the FCC rules.")

38. Therefore, Mr. Helgeson understood that the purpose of his 1998 Declaration was to discuss the documents taken without his authorization and used by GGPR in connection with its Petition to Deny. While Mr. Helgeson's Declaration did include an explicit discussion of his duties and responsibilities as Operations Manager, this discussion did not mention or refer to the PIF. The 1998 Declaration described his duties as follows: "My responsibilities in this position include managing certain of the business affairs of KALW, including contracts

with employees and consultants.” (SFUSD Exh. 4 at 74.) *This statement in no way references the PIF, nor does it state or suggest that Mr. Helgeson was responsible for compliance with FCC rules or regulations.*

39. Mr. Helgeson did not object to the language used in the 1998 Declaration drafted by counsel, but there is nothing to suggest that he intended the Declaration to state that he was responsible for FCC compliance related to the PIF, nor that he was suggesting that Mr. Ramirez began updating the file from his first days at the Station. While the language of the 1998 Declaration could have been more precise, Mr. Helgeson was not aware of the underlying claims raised by GGPR, did not know FCC rules related to a PIF, and therefore did not identify that the language drafted by Attorney Jenkins regarding the public file could be more precise given GGPR’s allegations. Standing alone, within the overall context of his 1998 Declaration, Mr. Helgeson did not read into the declaration the elaborate implications developed by the Bureau after the benefit of reading the full Petition to Deny, Opposition and later documents filed in the license renewal matter.

40. The Bureau’s interpretation of Mr. Helgeson’s 1998 Declaration requires a finding that Mr. Helgeson was a manipulative, deceitful person. Following hearing testimony, the preponderance of evidence established that Mr. Helgeson is someone who simply followed the direction of the Station’s long-standing communications counsel and made the mistake of not questioning the way the 1998 Declaration was phrased. As demonstrated at the hearing, Mr. Helgeson is the type of individual who follows directions and is most comfortable in his role with routine clerical and administrative tasks. While it is regrettable that he followed his attorneys’ lead without questioning, he did not commit a willful act of deceit towards the Commission.

41. In order to have "disqualifying misconduct" the Commission must find that "the fact of misrepresentation" is "coupled with proof that the party making it had knowledge of its falsity," the *sine qua non* factor necessary for finding fraudulent intent. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980). The record establishes that Mr. Helgeson has been consistent in his testimony regarding his understanding of the meaning of his 1998 Declaration, and that he had no intent to mislead the Commission.

**C. MR. HELGESON AND MS. SAWAYA PROVIDED COUNSEL WITH HONEST ASSESSMENTS OF THE CURRENT CONDITION OF THE PIF IN RESPONSE TO THE 2001 LETTER OF INQUIRY AND TRUSTED COUNSEL TO CONVEY THAT INFORMATION TO THE COMMISSION.**

42. The District and the Bureau are in agreement regarding the key events that occurred in response to the Mass Media Bureau's 2001 LOI. As recognized in the Bureau's Proposed Findings of Fact and Conclusions of Law, SFUSD staff provided truthful and accurate assessments of the condition of the PIF in 2001 and conveyed that information to the Sanchez Law Firm in writing. (EB Findings ¶¶ 103, 106.) Additionally, the Bureau concedes that the staff present at the Station in 2001 did not have any personal knowledge of the contents of the PIF in 1997, which was the focus of most of the questions in the 2001 LOI. (EB Findings ¶¶ 107, 53.) Finally, the Bureau recognizes that Mr. Helgeson did not review the 2001 LOI Response sent to the Commission. (EB Findings ¶ 107.)

43. Therefore, under the Bureau's conceded version of events, KALW staff provided accurate information to their counsel regarding the current state of the KALW PIF to assist counsel's preparation of the 2001 LOI Response, but did not possess information regarding the 1997 status of the file. Unfortunately, this accurate information regarding the state of the PIF in 2001 was not conveyed in the LOI Response drafted by counsel; nor did such counsel consult Mr. Ramirez, or evidently their own files regarding the state of the PIF in

1997. This is especially troubling because such counsel were directly involved with the 1997 License Renewal Application and the 1998 Opposition to the Petition to Deny, and had knowledge from that period that contradicted information included in the 2001 LOI Response. (SFUSD Findings ¶¶ 250-260.)

44. The Bureau correctly points out that SFUSD staff failed to review the LOI response prior to its submission to the Commission. However, the Bureau inexplicably draws the conclusion that Station staff made intentional misrepresentations or lacked candor to the Commission for their failure to delete inaccurate statements from the LOI Response drafted by counsel. (EB Findings ¶ 107.) Because the staff did not read the LOI response, as conceded by the Bureau, they could not have intentionally failed to remove inaccurate information that they did not review in the first place.

45. District staff providing the supporting declaration should have obtained and reviewed the final LOI Response, and were derelict in the failure to do so. However, the evidence submitted in this proceeding shows that there was no intent by District staff to deceive the Commission regarding the status of the PIF. Staff consistently provided honest and accurate descriptions of the PIF to their counsel, and trusted them to convey that information to the Commission in the legal documents submitted in this matter. If the staff intended to deceive the Commission, they would not have provided such honest and accurate information to counsel in the course of assisting their preparation of the LOI Response. While staff made mistakes, the evidence demonstrates that they had no intent to deceive the Commission.

**1. Ms. Sawaya and Mr. Helgeson Provided Counsel With Accurate Information About the Status of the PIF in 2001**

46. As conceded by the Bureau, District staff consistently provided their counsel with accurate information about the condition of the PIF. The Bureau admits that “Ms. Sawaya



learned and accurately reported to Mr. Sanchez that Mr. Ramirez prepared supplemental ownership reports after the Renewal Application had been filed and had not placed such reports in the PIF until December 1997. Ms. Sawaya even sent Mr. Sanchez copies of the two reports, along with three others that were also overdue. Likewise, Ms. Sawaya learned and accurately reported to Mr. Sanchez that, because of the 1989 Loma Prieta earthquake, the station had not kept up with required paperwork and had thereby not properly placed issues/programs lists in the PIF. Finally, Ms. Sawaya learned and accurately reported to Mr. Sanchez the back listings of issues/programs lists were in the process of being completed.” (EB Findings ¶ 103.) The Bureau concludes that “Ms. Sawaya determined rather quickly that the PIF had not been maintained as required, a fact that she reported to the Sanchez Law Firm.” (EB Findings ¶ 103.)<sup>7</sup>

47. Additionally, Mr. Helgeson testified regarding his numerous conversations with counsel regarding the materials missing from the PIF, and his efforts to update the file in 2001 pursuant to their instructions. (SFUSD Findings ¶¶ 190-193, 201.) The fact that counsel was involved and aware of Mr. Helgeson’s efforts to update the file is also supported by documentary evidence. Attorney Jenkins’ notes dated March 29 or 30, 2001, include a heading that reads “Issues/Programs lists,” and under this heading is the statement “Need these for every quarter since Aug. 1990.” Below this statement is a list of years from 1991 through 2001, and next to that list Ms. Jenkins wrote “All done now.” (SFUSD Findings ¶ 202, EB Exh. 25.) Attorney Jenkin’s notes also indicate that Mr. Helgeson told her that the 1995 Ownership Report was signed in December 1997. (SFUSD Findings ¶ 203, EB Exh. 25.)

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<sup>7</sup> The Bureau also acknowledges that Mr. Ramirez provided Attorney Sanchez with accurate information about materials missing from the PIF in his October 1997 memo to Attorney Sanchez. (EB Findings ¶ 106.)

48. Clearly, if Mr. Helgeson and Ms. Sawaya intended to deceive the Commission regarding the incomplete condition of the PIF, they would not have provided counsel with detailed written and oral accounts of the deficiencies in the PIF. Attorneys Sanchez and Jenkins were preparing the response to the LOI, and in the course of this preparation, Mr. Helgeson and Ms. Sawaya sent them information to assist with the preparation of that response. In order to accept the Bureau's interpretation, Ms. Sawaya and Mr. Helgeson would have had to follow up their written and oral descriptions of the PIF deficiencies with instructions to their attorneys to disregard all of that information, and to instead fabricate different responses. The more compelling scenario is that Mr. Helgeson and Ms. Sawaya provided accurate information to counsel, and then trusted counsel to include that information in the legal response that they were preparing.

**2. Ms. Sawaya and Mr. Helgeson Had No Knowledge of the Condition of the PIF in 1997, Which Was the Primary Focus of the 2001 LOI**

49. The bulk of the LOI sought information about the condition of the PIF on August 1, 1997, because this was the subject of the Petition to Deny filed by GGPR in 1997. As conceded by the Bureau, Mr. Helgeson had no knowledge of the condition of the PIF on August 1, 1997. (EB Findings ¶ 107) ("Mr. Helgeson did not have personal knowledge of the PIF's contents as of August 1, 1997, nor did he ever determine the bases for Mr. Ramirez's certification.") (See also SFUSD Findings ¶ 206-214.) Moreover, Ms. Sawaya had no means of knowing the condition of the PIF on August 1, 1997, because she did not begin working at the Station until March 2001. (SFUSD Findings ¶ 215.)

50. Indeed, the only persons involved in the 2001 LOI response who were aware of the condition of the PIF on August 1, 1997 were Attorneys Sanchez and Jenkins. In October 1997, Mr. Ramirez sent a memo to Attorney Sanchez acknowledging that the PIF did not

contain all required supplemental ownership reports or programs/issues lists. (SFUSD Findings ¶¶ 104-155, 251, 254, 259.) Additionally, Mr. Ramirez's January 1998 Declaration to the Commission, drafted by the Sanchez Law Firm, also acknowledged that the PIF did not contain all required supplemental ownership reports or programs/issues lists, and that the License Renewal Application certification was based on Mr. Ramirez's mistaken belief that a current annual ownership report and an incomplete issues/programs list would satisfy Commission rules. (SFUSD Findings ¶¶ 133-148, 251, 255, 259.) Mr. Helgeson and Ms. Sawaya were not aware of the contents of Mr. Ramirez's October 1997 Memo, nor were they aware of the contents of his January 1998 Declaration. (SFUSD Findings ¶¶ 213, 261, 265-71.)

51. Given the fact that Mr. Helgeson and Ms. Sawaya had no personal knowledge of the PIF in August 1997, it is unclear why the Bureau questions Mr. Helgeson's consistent testimony that his role in the 2001 LOI response was to update and report on the current condition of the PIF. The Bureau concedes that Mr. Helgeson had no personal knowledge of the contents of the PIF on August 1, 1997 (EB Findings ¶ 107), and then attacks him for stating that his role in the 2001 response was to bring the PIF up to date. Indeed, Mr. Helgeson's testimony and the documentary evidence demonstrate that his primary role in 2001 was to update the PIF, and report its contents to the Sanchez Law Firm. (SFUSD Findings ¶¶ 190-93, 201.)

52. It is also unclear why the Bureau questions Ms. Sawaya's testimony that her role in the 2001 LOI response was primarily as the facilitator to move the response process along. This is entirely consistent with the fact that she could not possibly provide responses to questions regarding the contents of the PIF on August 1, 1997. While her March 8 Memo

*provided Attorney Sanchez with the results of her review of the current status of the PIF in 2001, she could not be expected to provide information about what actually existed in the file four years prior to her arrival at the Station. Because the LOI focused on this earlier period, she could not provide responses to the questions, and could not sign a declaration asserting personal knowledge of the status of the file in 1997.*

53. Mr. Helgeson and Ms. Sawaya's testimony regarding their roles in the 2001 LOI Response was accurate, and is consistent with the facts conceded by the Bureau: that neither one of them had personal knowledge of the PIF on August 1, 1997 that would have enabled them to provide responses to the LOI questions regarding the contents of the file on that date.

**3. While Station Personnel Failed To Exercise Proper Diligence in Obtaining and Reviewing the Response to the LOI, There Was No Intentional Misrepresentation or Lack of Candor**

54. As noted above, the District in no way asserts that its employees acted in a diligent, conscientious or prudent manner when they permitted the LOI Response to be filed without first demanding and reviewing a final copy, or when Mr. Helgeson agreed to sign a declaration concerning matters beyond his personal knowledge. These failures have caused confusion and misunderstanding with the Commission, have damaged the reputation of the Station, and have resulted in extreme financial hardships on the District in defending the KALW license.

55. However, their failure to exercise due care to obtain and review the LOI response does not constitute intentional misrepresentation or lack of candor with the Commission. The Station employees consistently provided accurate information to counsel regarding the status of the PIF, expecting that this information would be included in the

*response being prepared by counsel. They had no intent to deceive or mislead the Commission regarding the subject matter of the LOI, and have been consistently forthcoming regarding the deficiencies in the PIF in the documents they submitted to counsel and in their testimony in this proceeding.*

56. As acknowledged by the Bureau, Mr. Helgeson did not review the LOI Response prior to its filing with the Commission. (EB Findings ¶ 107.) Mr. Helgeson should have demanded a final copy, and should have reviewed it prior to signature to understand what he was verifying.<sup>8</sup> However, it was inappropriate for Attorneys Sanchez and Jenkins to request that Mr. Helgeson sign the declaration when they knew that they were still working on the final draft, that Mr. Helgeson did not have personal knowledge regarding the 1997 condition of the PIF, and when the response contained information contrary to the information provided to the Sanchez Law firm by Mr. Ramirez, Mr. Helgeson and Ms. Sawaya.

57. The Bureau's misrepresentation argument rests on the theory that Mr. Helgeson and Ms. Sawaya intentionally deceived the Commission in 2001 in an attempt to continue the alleged deception of SFUSD's 1998 response to GGPR's Petition to Deny. (EB Findings ¶ 107.) This theory fails for several reasons. First, Mr. Ramirez's January 1998 Declaration acknowledges that the PIF certification was erroneous based on his misunderstanding of FCC rules. Therefore, there was no deception for them to perpetuate. Second, Mr. Helgeson and

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<sup>8</sup> While the Bureau concedes that Mr. Helgeson did not read the final LOI Response, they attack his failure to remove incorrect information from the final draft. This argument misses the point that Mr. Helgeson could not edit what he did not read. The Bureau also contends that Mr. Helgeson intended to deceive the Commission by sending counsel copies of the program guides and NPR lists for a period in 1997. However, Mr. Helgeson did not remove the March 2001 generation date on the NPR lists. The Bureau's contradictory theories cast Mr. Helgeson as a deceitful mastermind that elaborately sought to deceive the Commission, while also suggesting that he is a bumbling fool who forgets to remove the generation dates on the exhibits that are supposed to deceive the Commission into believing they were in the PIF in 1997.

*Ms. Sawaya were unaware of the contents of the 1998 Opposition and Mr. Ramirez's 1998 Declaration. They thus could not have been attempting to correspond with statements made in those documents. Third, they did not review the 2001 LOI Response, and therefore had no means of determining whether it agreed with the statements made in the 1998 Opposition and Declaration, even if they had read those earlier documents.*

58. Mr. Helgeson and Ms. Sawaya should not have placed unquestioning trust in Attorneys Sanchez and Jenkins, but they did so because they understood that the District's outside counsel had superior knowledge about the subject matter questioned in the LOI, and that they were directly involved in the filing of the License Renewal Application and the Opposition to the Petition to Deny. Moreover, they earnestly believed that Attorneys Sanchez and Jenkins would accurately report the information that they provided to them regarding the current status of the PIF. (SFUSD Findings ¶¶ 263-64, 267-68.) While SFUSD personnel were not diligent in the duty to review the response to the LOI, the evidence shows that there was no intent to deceive the Commission.

## **II. THE BUREAU FAILED TO MEET ITS BURDEN ON THE ADDED ISSUE RELATED TO SFUSD DEPOSITION TESTIMONY IN 2004**

59. In its Motion to Enlarge Issues, the Bureau requested that the Presiding Judge add the issue of whether, during their depositions of September 28, 2004, Ms. Sawaya and Mr. Helgeson each lied about their involvement in SFUSD's response to the LOI. (SFUSD Findings ¶ 321.) The Presiding Judge granted the Bureau's request and added the issue, explaining that "the record should be flushed out by examination in open court" while the Presiding Officer could observe the demeanor of the witnesses on the stand. *See Order*, FCC 05M-17 (rel. April 1, 2005) ; *Addendum*, FCC 05M-20 (rel. April 5, 2005). As set forth in the *Order*, it was the Bureau's burden to demonstrate that Ms. Sawaya and Mr. Helgeson

*had lied during their depositions as the Bureau claimed. Id.* A review of the record in this proceeding clearly shows that the Bureau utterly failed to meet its burden.

60. As set forth in the *Order*, FCC 05M-17 (rel. April 1, 2005), the Presiding Officer added this issue for the express purpose of cross-examination by the party with the burden of proceeding and proof – the Bureau. Yet, during the hearing, Bureau counsel did not bother to ask Ms. Sawaya or Mr. Helgeson a single question about their deposition testimony relating to the LOI.<sup>9</sup> If following the submission of the direct testimony of Ms. Sawaya and Mr. Helgeson the Bureau still had a viable case that Ms. Sawaya and Mr. Helgeson had lied at deposition, why abdicate its responsibility under the *Order* to probe their credibility on the issue at the hearing? The Bureau's capitulation at the hearing speaks volumes.<sup>10</sup>

61. In any event, as SFUSD has established (SFUSD Findings ¶ 322), Ms. Sawaya's deposition testimony did not deny or minimize her involvement in the response to the 2001 LOI, which was drafted by the Sanchez Law Firm, former SFUSD communications counsel. In fact, on many occasions during her deposition, Ms. Sawaya described her review of the PIF and her review of a draft of the response to the LOI. (SFUSD Findings ¶ 322.) When asked generally about her involvement, Ms. Sawaya described her role as a facilitator since she had arrived mid-way through the process, having started her employment on March 1, 2001. (SFUSD Findings ¶¶ 322-23.)

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<sup>9</sup> The Bureau did ask a handful of questions of Mr. Helgeson and Ms. Sawaya at hearing regarding their deposition testimony, however, none of the questions involved the 2001 LOI response, and most concerned inconsequential and irrelevant inquiries such as whether Ms. Sawaya had been a Shakespearean actress before her career in public broadcasting (Tr. 1236-37) or whether she had taken a three-day long weekend break during her first month at KALW (Tr. 1388-89).

<sup>10</sup> Not surprisingly given its abandonment of the issue at hearing, the Bureau is relegated in its Proposed Findings to essentially rehashing arguments made in its Motion to Enlarge on the subject. (EB Findings ¶80 *et. seq.*)

62. With respect to the March 8 Memo, as Ms. Sawaya explained at the hearing and in her declaration filed prior to the hearing, she did not remember at her deposition drafting the document and did not have an opportunity to review the document prior to her deposition because the Sanchez Law Firm did not provide SFUSD the March 8 Memo and other documents until January 2005. The Sanchez Law Firm waited this long to provide these documents even though in July 2004 SFUSD's new counsel had requested the transfer of all KALW files to new counsel. (SFUSD Findings ¶327.) As Ms. Sawaya further explained, had she reviewed the March 8 Memo prior to her deposition, she would have been able to state with more precision what information she had provided to the Sanchez Law Firm at the time of their preparation of the LOI Response. And soon upon reviewing the document in January 2005 – more than four years after it was written – Ms. Sawaya candidly acknowledged that she had written it and had mailed the only printed copy to Attorney Sanchez.

63. Despite its failure to ask Ms. Sawaya a single question about the issue during the hearing, the Bureau still maintains that it was implausible for Ms. Sawaya to forget about the March 8 Memo, a document that “raised troubling questions” about prior representations made by SFUSD. Ms. Sawaya, the Bureau argues, became part of an on-going cover-up to bolster the 1997 PIF “Yes” certification. Had the Bureau bothered to ask Ms. Sawaya at hearing, it would have seen that its conspiracy theory makes no sense. For one, why would Ms. Sawaya become part of an on-going cover up to bolster the 1997 PIF “Yes” certification since Mr. Ramirez had already admitted in his January 1998 Declaration that the 1997 PIF “Yes” certification was wrong? Likewise, it is a stretch for the Bureau to create the illusion of misrepresentation when it faults Ms. Sawaya's statement that she was out of work for “three days” as opposed to a three-day weekend soon after she began her employment at KALW.



Faulting a witness for her lack of memory as to what days she took off three and a half years before is unsupported by Commission precedent, is devoid of common sense, and falls way short of proving material misrepresentation.

64. In terms of Mr. Helgeson, his direct testimony and testimony at hearing was consistent with what was stated at his deposition and the documentary record. Mr. Helgeson confirmed that he did not have personal or even second-hand knowledge as to the contents of the 1997 License Renewal Application, other than assuming the PIF certification was correct. Having failed to ask Mr. Helgeson of any inconsistencies at the hearing, the Bureau essentially conceded that its arguments as to Mr. Helgeson's deposition testimony miss the mark.

### **III. EVEN IF ACTS OF INTENTIONAL MISREPRESENTATION WERE DEEMED TO HAVE OCCURRED, THE RECORD SUPPORTS RENEWAL OF SFUSD'S LICENSE TO OPERATE KALW**

65. Even assuming *arguendo*, that there was a finding of misrepresentation and/or lack of candor, the sanction of non-renewal would not be justified when the Commission considers the weight of the mitigating factors in SFUSD's favor. *See The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152, 2166-67 (1997) (license renewal granted when Commission determines on the record "that the licensee can reasonably be expected to deal truthfully with the Commission in the future"), *vacated on other grounds, The Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *see also Normandy Broadcasting Corp.*, 8 FCC Rcd 1, 10 [¶ 53] (ALJ Sippel 1992) ("[I]n drawing conclusions about misrepresentation, the Commission will consider mitigating factors because the Commission has broad discretion in its choice of sanctions."); *WSUA Broadcasting Corporation*, 20 FCC Rcd 4231 (Media Bur. 2005) (resolving issues of misrepresentation and lack of candor concerning PIF violation when renewal applicant adopted PIF compliance plan).

66. When determining the appropriate sanction for misconduct by a licensee, the Commission has considered balancing factors including (1) meritorious programming;<sup>11</sup> (2) history of overall compliance and lack of prior violations;<sup>12</sup> (3) instituting procedures to ensure future compliance;<sup>13</sup> and (4) the deterrent effect of a sanction less than non-renewal.<sup>14</sup> The overwhelming case for each of these factors strongly mitigates – even under a finding of misconduct – of a sanction less severe than non-renewal.

**A. KALW PROVIDED MERITORIOUS SERVICE DURING THE RELEVANT TIME PERIOD**

67. Both the Commission and courts have long recognized the relevance of past meritorious programming in deciding whether to renew a broadcast license. The D.C. Circuit has affirmed the Commission's policy that "renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy 'weight.'" *Central Florida Enterprises, Inc. v. F.C.C.*, 683 F.2d 503, 506 (D.C. Cir. 1982); *Normandy Broadcasting Corp.*, 8 FCC Rcd 1, 12 [¶ 66] (ALJ Sippel 1992).

68. While this is not a comparative renewal proceeding, meritorious service is relevant to the decision of whether to renew a license. *See, e.g., Arkansas Educations Television Commission*, 6 FCC Rcd 478, 481 [¶ 13] (1991) (deciding to renew license despite violations, including issues/programs lists, where "licensee has made substantial efforts . . . to

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<sup>11</sup> *KQED, Inc.*, 3 FCC Rcd 2601, 2607 [¶ 26] (Rev. Bd. 1988); *CS WIGO, Inc.*, 85 F.C.C.2d 196, 209-11 [¶¶ 41-46] (1981).

<sup>12</sup> *Fisher Broadcasting, Inc.*, 15 FCC Rcd 24903, 24904-05 [¶ 7] (Enforcement Bur. 2000); *Dan J. McLean*, 9 FCC Rcd 1902, 1903 [¶ 12] (Field Operations Bur. 1994).

<sup>13</sup> *Fisher Broadcasting, Inc.*, 15 FCC Rcd 24903, 24904-05 [¶ 7] (Enforcement Bur. 2000).

<sup>14</sup> *Policy Regarding Character Qualifications In Broadcast Licensing*, 102 F.C.C.2d 1179 [¶ 103] (1986) ("Character Policy Statement") ("Sanctions imposed may deter future misconduct . . . a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission . . . Only in the most egregious case need termination of all rights be considered.").

be aware of community issues and has . . . provided issue-responsive programming in the public interest throughout the entire license period”).

69. By Stipulations between SFUSD and the Bureau , the parties stipulated, *inter alia*, “that the evidence in the record of this proceeding [...] establishes that KALW provided meritorious service during the periods of November 3, 1996 to November 3, 1997 and July 16, 2003 to July 16, 2004.” (SFUSD Exh. 79.) Also moved into evidence were a portion of the several hundred public comments extolling the programming of KALW and the Station’s contribution to the San Francisco community, and/or which urge the Commission to renew the KALW license. (SFUSD Exh. 79.) By *Order*, FCC 05M-42 (rel. Sep. 16, 2005), the Presiding Judge accepted such Stipulations.

**B. KALW HAS NOT BEEN SUBJECT TO ANY OTHER NOTICES OF VIOLATION**

70. Aside from the *HDO*, KALW has not been the subject of any notices of violation, notices of apparent liability or forfeiture for violation of FCC rules during the license term. (SFUSD Exh. T1 at 19; SFUSD Exh. T1 at 16; SFUSD Exh. T3 at 25.)

**C. SFUSD HAS IMPLEMENTED PROCEDURES TO ENSURE FUTURE COMPLIANCE**

71. SFUSD has taken several significant steps to ensure proper maintenance of the PIF. In March 2001, Ms. Sawaya secured the PIF in her office so that its access was monitored during business hours. (SFUSD Exh. T3 at 19.) At that time, the Operations Manager was specifically tasked to collect the required issues/programs lists, ownership reports and other materials required in the PIF. (SFUSD Exh. T3 at 19.) Station programmers and producers were instructed to complete issues/program lists in a timely manner and provided form guidelines. (SFUSD Exh. T3 at 19-20; SFUSD Exh. 44; SFUSD Exh. 45.) The administration

of SFUSD has also retained new legal counsel and substantially modified its procedures for FCC submissions. (SFUSD Exh. 48.) Those procedures are designed to ensure that FCC reporting requirements are timely met and that any applications to the FCC, and any responses to Commission inquiries, are accurate and complete.

**D. A SANCTION OF LESS THAN NON-RENEWAL WILL HAVE A SIGNIFICANT DETERRENT EFFECT**

72. A sanction short of non-renewal will unquestionably have a significant deterrent effect on SFUSD. *See Character Policy Statement* at ¶ 103 ("Sanctions imposed may deter future misconduct . . . a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission . . . Only in the most egregious case need termination of all rights be considered."). This proceeding has required a deficit-laden public school district to absorb the significant cost of making a strong legal defense for renewal. (Tr. 1524.) These are critical monies that in the future would be spend on other critical needs of the District. That alone is a significant deterrent against future violations.

73. The District has retained new counsel to represent it in matters of FCC compliance, and prior to the commencement of this hearing the District submitted an amended License Renewal Application which clearly answered "No" to Section III, Question 2 recognizing that -- with what it now knows -- it could no longer certify that the PIF was complete on August 1, 1997. (SFUSD Exh. 76.) In conjunction with new legal counsel, the District has also established new protocols to ensure continued compliance with all FCC matters. (SFUSD Exh. T3 at 23; SFUSD Exh. 48.)

## E. OTHER FACTORS MITIGATE AGAINST NON-RENEWAL

74. Another factor the Commission has considered in determining whether non-renewal is an appropriate sanction is the extent to which the principal actors of the licensee participated in or had reason to know of the misconduct. See *The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152, 2166-67 (1997), *vacated on other grounds*, *The Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *Empire Broadcasting Corp.*, 63 F.C.C.2d 634, 637 [¶ 11] (1976). In *Empire*, the Commission was persuaded that non-renewal was an excessive sanction for conduct which, “though serious, [resulted from] the failure of supervision on the part of the licensee[.]” *Id.* at 638 [¶ 13]. Although the licensee in *Empire* failed to exercise reasonable diligence to see that its agents and employees were acting in conformance with FCC regulations, that action was not “tantamount to intentional disregard of [FCC] Rules.” *Id.* at 638-39 [¶ 15].

75. Here, SFUSD relied on the advice and expertise of experienced communications counsel to ensure that its dealings with the Commission were at the level expected of responsible licensees. Such reliance was reasonable under the circumstances at the time. The Sanchez Law Firm had served as the District’s FCC specialist for many years without incident. (SFUSD Exh. 22 at 2; Tr. 1398-99.) The Station’s staff provided the requested information to the Sanchez Law Firm so that it would prepare full disclosures to the Commission. Documentation that surfaced during the discovery phase of this hearing (especially the October 1997 Memo from Mr. Ramirez to Attorney Sanchez, the March 8 Memo from Ms. Sawaya to Attorney Sanchez and the notes of Attorney Jenkin’s March 2001 conversation with Mr. Helgeson – none of which documents were forwarded to or located by SFUSD until this year), coupled with the failure to advise the District to amend the License Renewal Application to change the PIF certification and provide a final version of the LOI for review, raise serious

concerns as to the adequacy of prior communications counsel's representation of the District. However, at the time of the events in 1997, 1998 and 2001, SFUSD had no reason to doubt the reliability of its long-term outside counsel or to suspect that there might be obfuscation rather than clarification in the submissions such counsel filed with the Commission on its behalf.<sup>15</sup> Nor did the District have the expertise in FCC requirements and procedures, and in particular, nor did District employees in 2001 have the factual knowledge concerning the state of the PIF in 1997, to provide a basis to question the pleading tactics embarked upon by communications counsel. The District and the Station have already paid dearly (both monetarily and by the distractions from the conduct of their business of educating and informing) in defending before the Commission the privilege to serve the community. The District's good faith in seeking and relying on the advice of experienced communications counsel, even if in hind-sight was misplaced, is a compelling mitigating factor warranting renewal.

#### IV. CONCLUSION

76. The preponderance of the evidence in this proceeding, including not only credible testimony but also corroborating documentation, establishes that there was no intentional misrepresentation or lack of candor by SFUSD in its dealings with the Commission.

77. First, although SFUSD's 1997 License Renewal Application contained an inaccurate response to Question 2 of Section III with respect to the maintenance of KALW's PIF in accordance with Section 73.3527 of the Commission's Rules, the clear evidence is that former GM Ramirez made an innocent mistake. Mr. Ramirez undertook steps to educate himself regarding the myriad questions on the renewal application, but made the layman's error of assuming that his efforts to update the PIF with issues/programs documentation in

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<sup>15</sup> The Sanchez Law Firm was terminated as counsel to SFUSD in September 2004. (SFUSD Findings ¶ 309.)

1997 sufficed. Mr. Ramirez's credible testimony is bolstered by his consistent acknowledgement of his mistake: to communications counsel in October 1997, to the Commission in January 1998, to the Bureau at his deposition in November 2004, and to the Presiding Judge in his 2005 direct testimony and live cross-examination.

78. Second, the documents filed on behalf of SFUSD in January 1998 cannot be held to constitute misrepresentations or lack of candor. Mr. Ramirez's January 1998 Declaration clearly acknowledged the error in the License Renewal Application PIF certification. Neither Mr. Ramirez' nor Mr. Helgeson's 1998 Declarations were intended by the declarants to convey that Mr. Ramirez had immediately reviewed the PIF upon his coming to the Station or that Mr. Helgeson had substantive responsibility for the PIF.

79. Third, it is clear from the testimony and documentary evidence that there was no intentional misrepresentation or lack of candor by SFUSD in response to the 2001 LOI. As corroborated by the written record, KALW personnel honestly informed communications counsel as to the state of the PIF in 2001 and efforts undertaken at their direction to supplement the file. While it was derelict for the declarant supporting the response to have failed to have read the response, in any event, no SFUSD employee at that time had personal knowledge of the PIF contents as of August 1, 1997, and communications counsel should have undertaken to contact the Mr. Ramirez or, at a minimum, to refer to their own files from that period and Mr. Ramirez's January 1998 Declaration filed with the Commission. However, at the time, SFUSD had no reason to doubt the judgment of its then communications counsel.

80. Fourth, the Bureau's theory of a conspiracy of deceit during the depositions of KALW personnel holds so little water, it was not even probed at hearing.

81. Lastly, SFUSD admits to mistakes by KALW personnel and grave disappointment with its prior counsel. SFUSD relied on such counsel in good faith. The District has taken remedial measures to ensure that FCC requirements are timely met and, most importantly, that statements made to the Commission are reliable and accurate. The public interest in retaining this unique voice to the residents of San Francisco and the Bay area, including the students of the District and their parents, will be served by the renewal of the District's license for the Station.



Respectfully submitted,

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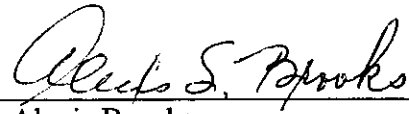
## Certificate of Service

I, Alexis Brooks, hereby certify that on this 15<sup>th</sup> day of November, 2005, a copy of the foregoing **San Francisco Unified School District's Reply Findings of Fact and Conclusions of Law** was sent by hand-delivery to:

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